CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 304

FRANK CAMPBELL LITTLETON, Farmer-Debtor,
Petitioner,

vs.

THOMAS N. DeLASHMUTT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

PETITION AND BRIEF.

ELMER MCCLAIN,
Lima, Ohio
Counsel for Petitioner.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA KEVIEW 5-6581

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

PETITION.

(The brief in support of this petition begins at page 17.

Unless stated otherwise all emphasis in both the Petition and the Brief is supplied.)

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices, of the Supreme Court of the United States.

Your petitioner respectfully shows:

I.
A SUMMARY STATEMENT OF THE MATTER INVOLVED.

THE ISSUES.

There are two issues presented:

(1) Whether the District Court should have heard petitioner's Application to vacate a purported sale of his farm, "Oak Hill", in farmer debtor proceedings under Title 11, USC Sec. 203, and afford him the procedure prescribed by statute, and

(2) Whether upon the filing of the petitioner's Affidavit of Bias and Prejudice the District Judge should have proceeded no further and another judge should have been assigned to hear the cause.

THE FIRST ISSUE.

(Concerning the Application)

The appellant on March 14, 1950 filed his application in the district court below for vacation of the purported sale in farmer debtor proceedings of his farm real estate, known as "Oak Hill"; for removal of all cloud upon his title thereto, (except such as might arise out of the pendency of the proceedings); and for the issuance of a statutory stay order. In support of it he stated nine grounds. Fol. 1273, R. 26a. A motion to dismiss (Fol. 1280, R. 28a) and a reply (Fol. 1285, R. 30a) followed.

At the request of the District Judge there was presented to him on behalf of the petitioner, a brief showing why the

district judge should hear the application. Fol. 1291, R. 43a.

The district court dismissed the application without hearing it. Fol. 1441, R. 36a.

A motion was filed requesting a hearing. Fol. 1445, R. 37a.

The motion requesting a hearing of the application was denied. Fol. 1451, R. 41a.

The Petitioner appealed (Fol. 1452, R. 42) and the Court of Appeals affirmed. R. .....

THE SECOND ISSUE.

(Concerning the Affidavit of Bias and Prejudice)

The appellant on October 27, 1950 filed in the district court below an affidavit of bias and prejudice. Fol. 1437, R. 33a. It was denied. Fol. 1441, R. 36a.

The Petitioner appealed. Fol. 1452, R. 42.

THE FIRST ISSUE.

THE FIRST BRANCH OF THE PETITION STATED.

(Relating to the Application)

This petition will first present the First Issue relating to the Application to vacate the purported sale in the farmer debtor proceedings of the real estate known as "Oak Hill".

The Scope of this Petition on the First Issue.

This portion of this petition is confined to the subject of the **right** to present by hearing the Application filed by the farmer debtor on March 14, 1950. Fol. 1441, R. 26a. It

includes the **right** of the farmer debtor to file his application and have it heard and the jurisdiction and **duty of the court to hear and rule upon it.**

It does **not purport to present or argue the substantive matters** which are comprised in the application (for it was never heard) but is **confined solely to the adjective subject of procedure**—the right of presentation, the right to be heard, and the right and duty of the court to hear and determine the questions presented.

May it be made clear that the Application, (Fol. 1441, R. 26a), if granted, will not penalize any person financially. That is, any money paid in by the purchaser must be refunded to him. All moneys paid out stay put and are not subject to recall. All the Application seeks to accomplish is to confirm title in the farmer debtor where, in the opinion of Counsel for the farmer debtor, it belongs so he may redeem it as the statute provides.

TWO FUNDAMENTAL CHARACTERISTICS OF THIS BRANCH OF THE CASE.

(1) Basic Difference between Farmer Debtor Law and Bankruptcy.

Consideration of this branch of the petition requires that the basic difference between the farmer debtor law and bankruptcy be clearly distinguished because the errors complained of stem from ignoring that basic difference.

The most important characteristic of this case is that it is controlled by the farmer debtor law, Title 11 USC, section 203, usually referred to as "Sec. 75" (of the Bankruptcy Act), which, although a part of the Bankruptcy Act, is distinctly different from another part of the Bankruptcy Act, now referred to as general bankkruptcy. No

other part of the Bankruptcy Act applies to farmer debtor proceedings unless Section 203 requires it. *Benitez* v. *Bank,* 313 US 270.

In 1933 by Chapter VIII, entitled "Provisions for the Relief of Debtors", it was enacted that "**In addition** to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupts, courts of bankruptcy shall exercise jurisdiction in proceedings for relief of debtors" . . .

The **additional jurisdiction** so created advances into a new field wholly different from bankruptcy as theretofore understood, and it is governed by entirely different procedures. Some of the applicable differences will be analyzed in the Brief supporting this Petition. See page 31.

In all, five different debtor laws were enacted for (1) individuals, (2) farmers, (3) railroads, (4) corporations and (5) municipalities.

(2) The Issue Presented to the District Court for Hearing Was Not For Hearing in the Court of Appeals and Is Not Before this Court.

Another characteristic of this case is that the issue presented to the District Court below in the Application (Fol. 1441, R. 26a) was not before the Court of Appeals on appeal because the District Court dismissed the application (Fol. 1273, R. 26a) without a hearing as "without merit" (Fol. 1441, R. 36a), and a motion requesting a hearing, made after the dismissal (Fol. 1445, R. 37a) was denied. (Fol. 1451, R. 41a) and the **issue** was not allowed to be presented.

The **only issue** before this court on this branch of this petition is **whether the District Court should have heard the Application.**

II.

THE STATUTE INVOLVED.

The governing statute in this branch of the petition is 11 USC 203, known as the Farmer Debtor Law, being Sec. 75 of the Bankruptcy Act.

III.

THE DECISIONS OF THE COURTS BELOW.

No opinion was rendered by the District Judge below. The orders of that Court are at Fol. 1441, R. 36a and Fol. 1451, R. 41a.

The decision of the Court of Appeals below is reported as *Littleton* v. *DeLashmutt,* 188 F. 2d 973.

IV.

THE APPLICABLE FACTS AND PROCEDURE.

(Relating to the Application)

The procedural facts, applicable to this branch of this Petition are these:

In 1941 the Petitioner Frank Campbell Litleton, the owner of "Oak Hill" (President Monroe's home and estate), which had been farmed by Mr. Littleton for many years, filed in the district court below his petition as a farmer debtor under Title 11 USC, section 203, subsections (a) to (r), (Sec. 75 (a) to r)) for composition or extension of his debts. Fol. 2, R. 15a.

When the creditors rejected his proposal for composition or extension the procedure under subsections (a) to (r) was thereby ended and, pursuant to the statute, he filed his amended petition as a farmer debtor under subsection (s). Fol. 282, R. 17a. He was thereupon adjudicated a farmer debtor bankrupt and the entire estate was appraised. Fol. 285, R. 18a. Fol. 300 and 315, R. 20a and 21a.

Neither subsections (a) to (r) nor subsection (s) require that a farmer debtor be insolvent, the purpose of the statute being to save the farmer debtor's title to his property—not to distribute his estate to his creditors.

Mr. Littleton's estate was solvent when he filed his farmer debtor petition and remained solvent at all times thereafter. The Summary of Debts and Assets attached to his petition showed debts of $184,580.70 and assets of $211,595.10. Fol. 3, last sheet. R. 16a. The appraisals by the court of real estate and chattels were a total of $221,499.60. Fol. 300 and 315, R. 20 and 21a.

Only the real estate was sold and the proceeds overtopped all claims, costs and expenses of the proceedings by several thousands of dollars, which remained due to Mr. Littleton after payment of all claims and costs. Besides that sum chattels appraised at more than $21,000 were turned over to him.

After the sale the Petitioner, Mr. Littleton, and the Respondent, Mr. DeLashmutt, entered into an agreement whereby in consideration of certain things to be done by the Respondent DeLashmutt the Petitioner Littleton was to withdraw certain pending motions, etc., challenging the validity of the sale to DeLashmutt and execute a quit claim deed to DeLashmutt. Mr. Littleton performed his part of the agreement by withdrawing all objections to the sale then on file executing and delivering a quit claim

deed to Mr. DeLashmutt, but Mr. DeLashmutt failed to carry out his part of the agreement. See Mr. Littleton's statement in his "Answer" at Fol. 1285, R. 30a, paragraph 2.

The Petitioner, Mr. Littleton, thereupon filed his "Application" to vacate the sale and for proceedings which would comply with the statute Title 11, Section 203, ("Sec. 75"). Fol. 1273, R. 26a to 28a. In it he set up nine reasons or grounds in its support.

In answer to this Application the Respondent, Mr. DeLashmutt, filed his "Motion of Thomas N. DeLashmutt" alleging (a) that the district court had already rejected all of the grounds of the Application; (b) the Petitioner, Mr. Littleton, had withdrawn all objections to the sale which were on file; and (c) by deed, recorded by DeLashmutt, conveyed all title and interest to DeLashmutt. Fol. 1280, R. 28a.

To this answer the Petitioner, Mr. Littleton, filed his reply, titled "Answer of Farmer Debtor to Motion of DeLashmutt" (Fol. 1285, R. 30a to 33a) in which he denied (1) that the court had rejected all grounds of the Application and (2) denied that he either approved the sale or received benefits from it; (3) denied that his withdrawal of objections and his quit claim deed were of any effect, because DeLashmutt failed to carry out his promises, which promises were the basis of Mr. Littleton's withdrawal of his objections and the execution of the quit claim deed, and therefore both the withdrawal and deed were void.

In his said "Answer" he reiterated more in detail the nine grounds supporting his Application, specifically denying that the court had theretofore rejected all grounds asserted in the Application and specifically alleging that no stay order as provided by statute was ever issued. Fol. 1285, R. 30a to 33a.

Complying with a request made by the District Judge a brief on behalf of the Petitioner, Mr. Littleton, was filed setting forth the reasons why the judge should hear the application. R. 43a. Filing date October 14, 1950 shown on Clerk's Docket Entries at R. 10a, entry of October 14, 1950.

The District Court denied the Application without a hearing, characterizing it as "seeking a rehearing or further hearing" and as "without merit". Fol. 1441 R. 36a, at R. 37a, paragraph 2.

Thereupon the Petitioner filed his "Motion for Hearing" Fol. 1445, R. 37a.

The District Court denied this Motion without a hearing. Fol. 1451, R. 41a.

The Petitioner appealed. Fol. 1452, R. 42a.

V.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is conferred by Title 28 USC, Section 1254. (Formerly Section 240 (a) of the Judicial Code, 28 USC, Section 347 (a), as printed on page 5 of the Appendix to the Revised Rules of this Court.)

The petitioner has complied with Title 28 USC, Section 2101 (c). (Formerly Section 8 (a) of the Act of February 13, 1925; 28 USC, Section 350, as printed on page 7 of the Appendix to the Revised Rules of this Court.)

Petitioner's Petition for a Rehearing was denied by the Court of Appeals on June 11, 1951 when its judgment became final and upon his application the mandate was stayed pending the filing of this Petition for Certiorari.

This Petition for Certiorari is filed in compliance with the statute.

VI.

THE QUESTION PRESENTED ON THIS BRANCH OF THE PETITION.

(Relating to the Application to Vacate the Sale and Proceed as the Statute Requires.)

This petition for certiorari presents the following question relating to the application to vacate the sale of "Oak Hill" and for proceedings in accord with the statute:

The sole question presented is whether the district court should hear the issues raised (1) by the Petitioner's Application (Fol. 1273, R. 26a to 28a); (2) the Motion of DeLashmutt, Fol. 1280, R. 28a to 29a); and (3) the reply ("Answer") filed by the Petitioner. Fol. 1265, R. 30a to 33a.

The issues therein raised were not heard but summarily dismissed or denied, the only justification expressed being that they had been already heard, which is not true. For instance the issue of whether a stay order was issued in accordance with the mandate of the statute (Fol. 1273, R. 26a, paragraph 1; Fol. 1285, R. 30a at 31a paragraph 1.) was never presented nor heard or decided. The issue of the breach of contract by DeLashmutt, raised by Littleton (Fol. 1285, R. 30a paragraph 2) is another issue raised by the proceedings which was never heard.

VII.

REASONS FOR ALLOWANCE OF THE WRIT.

(Relating to the Application)

The Court of Appeals below has sanctioned the departure by the District Court below from the accepted and usual course of judicial proceedings, by affirming the orders of

the District Court which dismissed without any hearing whatever the issues squarely raised by the Petitioner's Application, Respondent's Motion and Petitioner's Reply. Fol. 1273, R. 26a to 28a. Fol. 1280, R. 28a to 29a. Fol. 1285, R. 30a to 33a.

The Court of Appeals never came to grips with the issue before it, namely whether the District Court should hear the issues presented to it. It merely ignored it.

Its opinion, *Littleton* v. *DeLashmutt,* 188 F 2d 973, at no place discusses it. It assumes a fiction—that the issues had already been decided—whereas the issue of whether any stay order had been issued as prescribed by the mandate of the statute was not at any time heard by the District Court. And likewise the issue of the breach of his contract by DeLashmutt, invalidating the withdrawal of objections to the sale by the Petitioner Littleton and his quit claim deed, was never heard by the District Court.

Both the District Court and the Court of Appeals characterized the Application as being for a "**rehearing**" which is a false statement. Not a shred of evidence or argument can be, or ever has been advanced to support the characterization. It was a HEARING that the Petitioner sought and still seeks.

Due Process of Law has been utterly disregarded and issues prejudged without any hearing whatever by the District Court and the Court of Appeals has sanctioned such violation of the most sacred and fundamental foundation of American jurisprudence that every litigant shall have his day in court.

THE SECOND ISSUE.

I.

THE SECOND ISSUE STATED.

(Concerning the Affidavit of Bias and Prejudice)

The other issue presented by the second branch of this Petition for a Writ of Certiorari is whether upon the filing of Petitioner's Affidavit of Bias and Prejudice (Fol. 1437, R. 33a to 36a.) the District Judge should have proceeded no further and another judge should have been assigned to hear the cause.

II.

THE STATUTE INVOLVED.

(In the second Issue)

The statute involved in this second branch of this petition is Title 28 USC, Section 144, which provides that when an affidavit of bias and prejudice is filed in a proceeding the "judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding".

III.

THE DECISIONS OF THE COURTS BELOW.

(On the Second Issue)

No opinion was rendered by the District Judge below. The Court's orders are found at Fol. 1441, R. 36a and Fol. 1451, R. 41a.

The decision of the Court of Appeals below is reported at *Littleton* v. *DeLashmutt*, 188 F 2d 973.

IV.

THE APPLICABLE FACTS AND PROCEDURES.

(Pertaining to the Affidavit of Bias and Prejudice)

On October 27, 1950 the appellant, filed in the District Court his Affidavit of Bias and Prejudice (Fol. 1437, R. 33a to 36a) pursuant to Title 28 USC, Section 144, which provides that when such an affidavit is filed in a proceeding the "judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." The Reviser's Notes show that in the present revision no substantive change was made in this long standing section of the Judicial Code.

The affidavit enumerates that the facts and reasons for his belief were:

1. The presiding judge, who came into the case in the latter part of the proceedings with no knowledge of what had transpired, permitted counsel for creditors to state his conclusions and interpretations of previous proceedings which the court assumed to be correct. See the Reporter Craig's transcript of the hearing of August 15, 1947 which is in the Record of proceedings certified to the Court of Appeals. Fol. 495, R. 34a.

2. This was again repeated and permitted at the hearing of April 27, 1949 as shown by the Reporter Craig's transcript which is also in the Record of the proceedings certified to the Court of Appeals. Fol. 675-678, R. 35a.

3. And at the same hearing of April 27, 1949, likewise in the Record in the same Reporter Craig's transcript, it appears that another counsel representing interests hostile to the Petitioner made similar statements which were untrue and were accepted by the Judge as correct. Fol. 1163-1189, 1206-1214, 1217-1220, R. 35a.

4. That a certain Kincaid, not a member of the bar of any court, was permitted to act as referee or conciliation commissioner in violation of the express provision of Title 11 Section 203. R. 35.

5. That said judge ordered disbursements made which were contrary to proofs of claim filed in the proceedings. R. 35a.

V.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is conferred by Title 28 USC, Section 1254. (Formerly Section 240 (a) of the Judicial Code, 28 USC, Section 347 (a), as printed on page 5 of the Appendix to the Revised Rules of this Court.)

The petitioner has complied with Title 28 USC, Section 2101 (c). (Formerly Section 8 (a) of the Act of February 13, 1925; 28 USC, Section 350, as printed on page 7 of the Appendix to the Revised Rules of this Court.)

Petitioner's Petition for Rehearing was denied by the Court of Appeals of June 11, 1951 which was the date of its final judgment. Upon his application the Mandate was stayed pending this Petition for Certiorari.

This petition is filed in compliance with the statute.

VI.

THE QUESTION PRESENTED ON THIS BRANCH OF THE PETITION.

(Relating to the Affidavit of Bias and Prejudice)

The only question here presented is whether the judge, upon the filing of the Affidavit of Bias and Prejudice should

have withdrawn and had nothing further to do with the cause and whether another judge should have been assigned to hear it.

VII.

REASON FOR ALLOWANCE OF THE WRIT.

(Relating to the Affidavit of Bias and Prejudice)

The decision of the Court of Appeals decides a federal question as to the interpretation of Title 28, Section 144, which has not been settled by this court and should be finally settled.

Your Petitioner therefore prays that a Writ of Certiorari issue to the Court of Appeals for the Fourth Circuit directing it to certify and send to this court a transcript of the record and of the proceedings thereon so this cause may be finally determined by this court, and for all other proper relief.

ELMER MCCLAIN,
Lima, Ohio,
Counsel for Petitioner.

Fairbanks, Alaska,
August 15, 1951.

BRIEF.

In Support of the Foregoing Petition for Writ of Certiorari.

I.

Report of the Decision Below.

No decision was rendered by the District Court. The final orders of the District Court are found at Fol. 1441, R. 36a and Fol. 1451, R. 41a.

The decision of the Court of Appeals is reported as *Littleton* v. *DeLashmutt,* 188 F 2d 973.

II.

Grounds Upon Which the Jurisdiction of This Court is Involved.

The basis of the jurisdiction of this court has been set out in the preceding Petition at pages 9 and 14 under the headings "Statement of the Basis of the Jurisdiction of This Court" and at pages 10 and 15 under the headings "Reasons for the Allowance of the Writ".

ON THE APPLICATION.

III.

Statement of the Case.

(On the First Branch of the Petition for Certiorari Relating to the Application)

In the proceedings under Sec. 75 the farmer debtor, the Petitioner here, prior to the sale which the District Court ordered had filed certain motions challenging the validity of the proceedings, and particularly the order of sale. Notwithstanding the pendency of such motions the sale was held. Thereafter the farmer debtor (Petitioner here) and the purchaser (Respondent here) entered into a contract whereby, in consideration of certain things to be done, the farmer debtor withdrew all his pending objections to the validity of the sale and executed a quit claim deed to the purchaser. However the purchaser failed to carry out his undertakings. Fol. 1273, R. 36a. Fol. 1280, R. 28a. Particularly paragraphs (b) and (c). Fol. 1285, R. 30a, particularly paragraph 2.

The Petitioner then filed his Application setting up certain fatal defects in the proceedings, chiefly that a valid stay order under Sec. 75 (s) (3), which is absolutely necessary to the execution of the statute, had never been issued because the order which purported to comply with the statute requiring a stay of three years was, by its terms, made retroactive more than twenty-two months, being thus really a stay of but a year and two months, (whereas the statute requires three full years, Sec. 75 (s) (3). Title 11

USC Sec. 203 (s) (3)), and that the sale was held nearly three months less than three years from the date of the entry of the retroactive order. Fol. 1273, R. 26a, paragraph 1. Fol. 1285, R. 31a, paragraph 1.

To the allegation of the purchaser (Respondent here) that the farmer debtor (Petitioner here) had withdrawn all objections filed by him and executed a quit claim deed (Fol. 1280, R. 28a, paragraph (b)), the farmer debtor replied (in his "Answer") that such acts by him were conditioned upon undertakings by the purchaser which were not performed and therefore void. Fol. 1285, R. 30a, paragraph 2.

To the allegation of the purchaser that the District Court had theretofore rejected all of the grounds asserted in the Application (Fol. 1280, R. 28a, paragraph (a)) the farmer debtor replied denying that they had all been so rejected. Fol. 1285, R. 30a, paragraph 1.

In his Application and in his "Answer" (Reply) (Fol. 1273, R. 26a, Fol. 1285, R. 30a) the farmer debtor alleged numerous other defects in the proceedings some of which had been theretofore rejected by the District Court and by the Court of Appeals on appeal. **But that fact does not validate the main defects** of (1) absence of a valid stay order, (2) sale before the expiration of the statutory three years after the entry of a stay order, (3) the failure of the District Court to act upon the objections filed before the sale (which objections still remain because of the breach of contract by the purchaser) and (4) the breach of contract by DeLashmutt.

The District Court summarily dismissed the Application upon the theory that it related "to issues heretofore determined by this Court and by the United States Court of Appeals, Fourth Circuit, in this proceeding, in which certiorari was denied by the Supreme Court of the United

States'' and that the application ''is without merit''. Order at Fol. 1441, R. 36a, paragraph 2 at 37a.

After the foregoing order was entered the farmer debtor filed his ''Motion for Hearing'' in which he set forth that said order was entered without any hearing and without opportunity to support it and moving that the order be set aside and a hearing afforded with opportunity to adduce evidence and argument in support of his application. Fol. 1445, R. 37a.

This motion was likewise denied on the ground that it was ''without merit''. Fol. 1451, R. 41a.

Thereupon Notice of Appeal was filed (Fol. 1452, R. 42a.) and on appeal the orders of the District Court were affirmed. *Littleton* v. *DeLashmutt*, 188 F 2d 973.

IV.

Specification of Errors As to the First Branch of the Appeal.

(The Application)

1

The Court of Appeals erred in sanctioning the departure by the District Court from the accepted and usual course of judicial proceedings when it refused to hear, and it dismissed, the Application of the Petitioner to vacate the sale of his real estate in farmer debtor proceedings and afford him the procedure specified by the mandate of the statute, Title 11, Section 203, (s).

2

The Court of Appeals erred in holding that the Application seeking a vacation of the purported sale of the farmer debtor's real estate on the grounds that no valid stay order had been issued was without merit.

3

The Court of Appeals erred in holding that the Application in seeking a vacation of the sale of the farmer debtor's real estate on grounds that the purported sale was held before the expiration of three years from the entry of the purported stay order was without merit.

4

The Court of Appeals erred in holding that the Application for vacation of the purported sale of the real estate was an application for a **rehearing** and **not** for a **hearing.**

V.

SUMMARY OF THE ARGUMENT.

(Relating to the Application.)

Not a single one of the four reasons stated by the District Court for refusing a hearing of the Application can be sustained. (1) Calling the Application for a hearing a request for a **rehearing** can not make it so. (2) Reference to denial of certiorari by this Court has no bearing. (3) Characterizing an Application as "without merit" is prejudgment without a hearing on the merits and depriving the applicant of his day in court. (4) The proceeding, said by the District Court to have been "terminated", is shown by the Docket Entries of the Court and by the Court's proceedings to be still pending.

A court of bankruptcy may hear any objections raised in any stage of a proceeding because it has no terms and the proceeding from beginning to end is as if conducted in one day.

Many farmers have irretrievably lost their farms and homes because some courts have persisted, as here, in ad-

ministering farmer debtor cases under Section 75 as if they were bankruptcy cases under general bankruptcy. This court has many times admonished the courts to obey the mandate of the farmer debtor statute.

VI.

ARGUMENT OF THE FIRST BRANCH OF THE PETITION.

(Relating to the Application.)

1.

The Stated Reasons for the Dismissal of the Application Examined.

The Application to set aside the sale of "Oak Hill" was dismissed without a hearing and a motion to vacate the order of dismissal was also dismissed without a hearing. Fol. 1441, R. 36a. Fol. 1451, R. 41a.

No opinion was rendered. However the Order of Dismissal stated, (1) the "The Application relates to issues heretofore determined by this Court and by the United States Court of Appeals"; (2) that "certiorari was denied by the Supreme Court" and (3) "said application is without merit."

An entry on the Clerk's Docket is that of a letter dated October 25, 1950 noted as being "from Judge Hutcheson to Counsel denying further hearing in this matter". Entry of October 25, 1950 in Docket Entries at Fol. 1466. R. 1a. In that letter, (at Fol. 1435) Judge Hutcheson wrote: "As stated I have now reviewed the application, seeking a vacation of the sale of the real estate. I have also examined the brief filed by counsel for the farmer debtor on October 14, 1950. Upon consideration of the application and

the brief and the action of the United States Court of Appeals, Fourth Circuit, and the Supreme Court, it is my view that (4) there is nothing before this Court in connection with the proceeding, the same having been finally terminated."

The Four Stated Reasons Examined.

None of these four reasons given for the dismissal of the Application is tenable. They are here discussed in their order:

(1) The **first** stated reason for dismissal: That "The Application relates to issues heretofore determined by this Court and by the United States Court of Appeals".

There are two decisions of the Court of Appeals which are referred to, neither of which relates to the issues here.

They are:

(a) *Littleton* v. *Rust,* 166 F. 2d 1007.
(b) *Littleton* v. *Kincaid,* 179 F. 2d 848.

(a) In *Littleton* v. *Rust,* 166 F. 2d 1007 the Court of Appeals in its decision said (beginning with the fifth line of the opinion): "The only points raised by the appeal are based upon the contention that the Conciliation Commissioner who acted in the case was not qualified to act because not a lawyer." If this were the **only** grounds on which the Application was based, the statement that it related to issues already determined would be true. But it is not the sole ground. The first reason set forth in the Application at Fol. 1273, R. 26a, is that "No stay order pursuant to the statute has ever been entered." This point was never raised prior to the Application and if the district court had permitted a hearing to be had, it would have been indisputably proved to that court that "Oak

Hill" was actually sold more than two months before the end of the statutory period counting from the entry of the court purporting to fix it. Also that that entry attempted to do what no court may do, that is to make an order effective at a period antedating its entry.

The only other basis for the judgment of the Court of Appeals in *Littleton* v. *Rust,* 166 F. 2d 1007, was stated thus: "It appears furthermore that bankrupt has had the full three year period for rehabilitation that the statute contemplates" . . . "The bankrupt has had every advantage under the law that the statute contemplates and more" . . . This issue was not raised on the appeal. The words just quoted are precisely the same, in effect, as those of the district court in *Wright* v. *Logan,* 315 US 139, at 142 of which this court categorically expressed the opposite view: "Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes."

(b) In *Littleton* v. *Kincaid,* 179 F. 2d 848, the legality or validity of the sale of "Oak Hill" was not before the Court of Appeals. The notice of appeal confined the issue to the objections to the "Scheme of Distribution" as approved by the order of the district court from which the appeal was taken. The validity of the sale of "Oak Hill" was not in the appellant's "Points Relied On." The opinion did not embrace it.

Now as to any decision of the District Court "which heretofore determined" **the issues raised by the Application** there is none. The same observations made above concerning the two decisions of the Court of Appeals (*Littleton* v. *Rust,* 166 F 2d 1007, and *Littleton* v. *Kincaid,* 179 F 2d 848) apply also to the decisions of the District Court. The first ground of the Application (Fol. 1273, R. 26a) is that "No stay order pursuant to the mandate of

the statute has even been entered." The motion of the Respondent ("Motion of Thomas N. DeLashmutt", Fol. 1280, R. 28a) in paragraphs (b) and (c) raised the issue of the withdrawal of all objections pending before the sale and the execution of the quit claim deed by the Petitioner. In his Answer (reply) (Fol. 1285, R. 30) in paragraph 2 the Petitioner set up the breach of contract by DeLashmutt which destroyed the efficacy of both the withdrawal and the quit claim deed. And he again in paragraph 1, at R. 31a, further raised the subject of no stay order and asserted that the sale was held on a date which was **more than two months short of a three year stay period even if the order when entered had been valid.**

These issues were new and were never presented to the District Court prior to the Application and they have never been decided by any court.

The statement that the Application "relates to issues heretofore decided by this Court and by the United States Court of Appeals" is therefore disproved by the records of both the Court of Appeals and of the District Court as to the issues of (1) no stay order, (2) sale before any three year period expired, however calculated, and (3) the withdrawal of objections and the quit claim deed.

(2) The **second** stated reason for dismissal: "That certiorari was denied by the Supreme Court".

As the issues of (1) no stay order (2) sale before the expiration of any three year period, however calculated, and (3) the withdrawal of objections and the quit claim deed, since they were never before, or decided by, either the District Court or the Court of Appeals, consequently they were never before this Court.

Furthermore even if those issues had been presented to this Court by petition for certiorari which was denied, this Court has many times admonished the bar and the bench that denial of certiorari is never to be construed as approval or affirmance of the judgment of the lower court.

" . . . this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." (*State* v. *Baltimore Radio Show,* 338 US 912, at 919.)

"But it is not merely the laity that fails to appreciate that by denying leave for review here of a lower court decision this Court lends no support to the decision of the lower court. Obviously it does not imply approval of anything that may have been said by the lower court in support of its decision." *Agoston* v. *Commonwealth,* ..... US ....., 71 S. Ct. 9. October 9, 1950.

(3) The **third** stated reason for dismissal: That "said application is without merit."

A judge of a bankruptcy court may not side-step the duty to hear an application filed in a proceeding for the reason that he considers it frivolous or "without merit". When he hears it as a court he may deny it because, upon consideration of the evidence and law adduced and presented in its support he may disagree with its proponents and deny it. That is judicial process, due process of law by giving the applicant his day in court. American and English jurisprudence do not countenance shutting the door in the face of a movant or petitioner without a hearing.

A judge may not deny a motion without a hearing because it is his opinion that it is without merit. It is not frivolous or a sham because the judge, upon reading it, con-

siders that he does not agree with the theory upon which it is based. Even then he should act upon motion duly heard. Courts do not function otherwise. Judgments are entered after the parties have had their "day in court" by presenting evidence and law in support of their several contentions as a hearing. "A government of laws and not of men" means just that. A judge does not act upon his individual opinion but only after balancing the law after presentations of evidence and law by argument by way of a hearing in open court.

The Respondent DeLashmutt does not consider the Application to be "without merit" as may be seen by a look at the content of his answer (denominated "Motion") at Fol. 1280, R. 28a. (1) He says he is the owner of "Oak Hill" because he bought it from the trustees and has a deed. This merely begs the question by asserting a conclusion contrary to that of the Application thus raising an issue. (2) He moves to dismiss the Application because, as he asserts in paragraph (a) of his Motion: "The district court, affirmed by the Court of Appeals Court on appeal, has rejected all the grounds asserted by the application." This statement is not true as has been demonstrated above.

Certainly issues of (1) whether a stay order in a farmer debtor case has or has not been issued, (2) of whether a sale was held before the three year period expired (if a valid stay order had been issued) and (3) whether objections filed before sale and never heard, have been withdrawn and a quit claim deed when the claimed withdrawal and the deed were based a consideration never performed, are not "without merit". This court granted certiorari in *Wright* v. *Logan*, 315 US 139, because the farmer debtors were denied the benefits of a legal stay order as prescribed by the mandate of the statute in the farmer debtor law, 11 USC 203 (s) (3), (Sec. 75, (s) (3)).

It therefore can not be said that the Application "is without merit".

(4) The **fourth** stated reason: That "there is nothing before this Court in connection with the proceeding, the same having been finally terminated".

The Application was filed March 14, 1950. Fol. 1273, R. 26a. Entry on Clerk's Docket of March 14, 1950. Fol. 1466, R. 10a.

Since that filing the following have occurred in the case.

Order of Distribution.

Order reserving right of creditors to object to computations in the Order of Distribution.

An appeal was then pending in *Littleton* v. *McNeill,* 179 F 2 848, and certiorari was later denied by this court in *Littleton* v. *McNeill,* 340 US 809.

Indeed from R. 10a to 12a there appear on the Clerk's Docket after the filing of the application on March 14, 1950 forty two entries of which nine, the last being nine months after the filing of the Application, relate to matters other than the Application, and disclose that the case was still pending.

It is clear that the case was not "terminated" when the Application was filed.

2.

Even Though the Case is not Terminated in the District Court, May it Hear the Application?

Courts of Bankruptcy Have No Terms.

Any proceeding in a court of bankruptcy under legislation "on the subject of Bankruptcies" (quoted from the Constitution, Article I, Section 8, Clause 4) is a single suit

from beginning to end. As to it there are no terms of court. It is as if all of the proceedings occurred on a single day. Any action of the court is subject to reconsideration by it regardless of the lapse of time.

The general rule that an order of the court becomes unassailable after term and is "the law of the case" if not reversed or modified by review duly applied for does not apply to the proceedings of a court of bankruptcy in the administration of a statute upon the subject of bankruptcies.

A farmer debtor case is, of course, within the subject of bankruptcies. In *Wright* v. *Vinton*, 300 US 440 at page 470 this Court unanimously held of the farmer debtor law (11 USC 203, "Sec. 75") that 'The power here exerted by Congress is the broad power 'To establish . . . uniform laws on the subject of Bankruptcies throughout the United States.' "

A confirmation of a sale in bankruptcy can be vacated, if good cause exists, "after term", for there are no terms in bankruptcy.' 6 Remington on Bankruptcy, Sec. 2569, Page 61."

"A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt is but one suit. The District Court for all the purposes of its bankruptcy jurisdiction is always open. It has no separate terms. Its proceedings in any pending suit are, therefore, all times open for reexamination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation.

Applications for such reexaminations may be made by motion or petition according to the circumstance of the case. Such a motion or petition will not have the effect of a new suit, but of a proceeding in the old one." *Sandusky* v. *National Bank,* 90 US (23 Wall.) 289, 292.

Note. In the District Court the foregoing quotation appeared in full in the Brief submitted to that Court. R. 43a at 47-48a. In the Court of Appeals the last paragraph and the last sentence of the paragraph preceding it were omitted because they were considered not to be pertinent. But on oral argument before the Court of Appeals counsel for the appellee asserted that the omission of the clause "provided rights have not become vested under it which will be disturbed by its vacation" was significant. That clause has therefore been restored in this brief with the observation that no right could vest in the purchaser, DeLashmutt, the Respondent, if the withdrawal of objections and the quit claim deed were conditioned upon considerations never performed, as is asserted by the Petitioner Littleton in his "Answer" (reply) to the Motion filed by DeLashmutt to dismiss the Application. Fol. 1280, R. 30a paragraph (b). Fol. 1285, R. 30a paragraph 2. And further, if the sale was held before any valid stay order was entered, or if the order as entered was valid from its entry, then a sale conducted nearly three months before the expiration of the three year stay period was made without power and void.

Borchard v. *California Bank,* 310 US 311, illustrates the point that there are no terms in bankruptcy procedure, that a farmer debtor case is one case from its beginning to its final termination, and any proceeding is subject to examination at any time before the case is finally closed even though the parties may consent and the court issue orders.

Each year for three years the farmer debtors and the mortgage holding creditor agreed by stipulation and the

court each year entered its formal order (by three separate entries, one for each year) that the proceeds of crops harvested should be paid to the creditor. This was not the method prescribed by Section 75 requiring that the court should fix the rent to be paid by the farmer debtors to the court.

No review of any of these orders was ever sought.

After the entry of the third order the farmer debtors petitioned the Court to revert to the procedure laid down in Section 75 which the Court refused to do and instead, upon motion of the mortgage holder, ordered the case to be terminated. The court of appeals affirmed the district court but this Court reversed both and ordered that the statutory procedure be strictly followed.

3.

There Are Fundamental Differences between Bankruptcy and Farmer Debtor Proceedings.

Thousands of farmers have lost their farms, although they invoked Sec. 75, the farmer debtor law, not because of defects in the statute but because of maladministration of the procedure laid down in the statute and by the many decisions of this Court which enjoined the Courts repeatedly to obey the "mandate of the statute".

This sad commentary is necessary, not because of any evil intent in the minds of the administrators but, because in it the Congress enlarged the conception of "the subject of bankruptcies" beyond previous legislation which many creditors, lawyers and judges have misunderstood —and some have been hostile to.

The errors committed in this Littleton case have been tragic and many are beyond remedy. However, fortunate-

ly the ones which are the basis of this petition for certiorari can be remedied.

An Expanding Conception of the Subject of Bankruptcies.

Most of the difficulties that have arisen in the administration of farmer debtor cases (as in this *Littleton* case) have been due to a disregard of the new field preempted by Congress when it enacted Chapter VIII "for the relief of debtors" under the power delegated by Title I, Section 8, Clause 4, in the Constitution which empowers it to legislate upon the "subject of Bankruptcies."

The history of the legal development of the conception of bankruptcy is very interesting.

The Roman law provided for the execution of the debtor and the division of his body among his creditors, then the enslavement of him and his family. The Flemish law broke his table (banque) and coined the word "bankrupt". The English law put him, and later his family, in jail.

Ever since our first Bankruptcy Act of 1800, which was patterned after the English statute, legislation on the "subject of bankruptcies" has steadily enlarged the subject beyond the Roman and English conceptions.

In 1902 this Court in *Hanover* v. *Moyses,* 186 US 181, said the constitutional clause granting power to legislate "on the subject of bankruptcies" was the same as if it read "on the subject of any person's inability to pay his debts".

Judge Story in his "Comments on the Constitution" wrote that "a law on the subject of bankruptcies, in the sense of the Constitution, is a law making provision for cases of persons failing to pay their debts".

In *Louisville* v. *Radford,* 295 US 555, in 1935, this Court said that the scope of bankruptcy power "is not necessarily limited to that which has been exercised."

In discussing the "bankruptcy power" in *Campbell* v. *Alleghany,* CCA 4, 75 Fed 2d 947 in 1945, Judge Parker, in upholding the constitutionality of the corporation debtor law, Sec. 77 B of the Bankruptcy Act, now Title 11, USC, Chapter 10, (one of the companions of the farmer debtor law) said:

"Doubts as to the validity of Section 77B are based very largely upon the fact that the relief which it provides for embarrassed corporations, their creditors and stockholders, has not heretofore existed under the law of the country, and for that reason seems novel and questionable. It must be remembered, however that the power granted Congress over the subject of bankruptcies is plenary, and that in its exercise Congress is not limited by what has been attempted in the past but may shape its remedies in a way to meet adequately the problems of the present."

A Few of the Differences which Distinguish Farmer Debtor Law from General Bankruptcy.

This Court in several decisions has said that district courts in administering farmer debtor cases must follow the "precise procedure of the statute", "the mandate of the statute" and enforce the "spirit of the statute" by "liberal construction". *Wright* v. *Logan,* 315 US 139, 141-142; *John Hancock* v. *Bartels,* 308 US 180, 184; *Wright* v. *Union Central,* 311 U.S. 273, 279; *Borchard* v. *California,* 310 US 311; *Benitez* v. *Bank,* 313 US 270; *Kalb* v. *Feuerstein,* 308 US 433.

Ordinarily a bankruptcy court may surrender its jurisdiction over mortgaged real estate and disclaim it as "burdensome". In the decisions just cited this Court held emphatically that in a farmer debtor proceeding it may not do so.

In regular bankruptcy title to the property reposes in the court upon adjudication and it must be conveyed by the court. In farmer debtor proceedings title stays in the farmer debtor. A receiver in possession must be removed. It is only after the expiration of a three-year stay that the court may take over title and sell the property after according to the farmer debtor full opportunity to redeem.

In general bankruptcy there is always adjudication. In farmer debtor proceedings adjudication under the petition is prohibited by statute and is ordered only upon an amended petition by the farmer debtor after all proceedings are completed under the petition.

In regular bankruptcy all questions relating to title, procedure, etc., are governed by the creditors, and for their benefit, under the general Bankruptcy Act and the General Orders of this Court. In farmer debtor proceedings all proceedings are governed exclusively by the provisions of the farmer debtor law for the benefit of the farmer debtor to save to him the title to his real estate.

CONCLUSION TO THE ARGUMENT ON THE FIRST BRANCH OF THE APPEAL.

(The Right to a Hearing on the Application.)

Of course we can not argue the petitioner's case as envisaged in the Application as if at a hearing (of which he has been deprived). The issue before this Court is only the question of the *right to a hearing*—nothing more.

We respectfully submit that due process of law requires the district court to accord to the appellant a hearing on his Application at which he may present his evidence and the law in support of it, and have his day in court.

ARGUMENT ON THE AFFIDAVIT OF BIAS AND PREJUDICE.

III.

Statement of the Case.

(On the Second Branch of the Petition for Certiorari Relating to the Affidavit of Bias and Prejudice)

The District Judge, the Honorable Sterling Hutcheson, came into the case without any previous knowledge of it. He explained his lack of knowledge of the case in a statement which he made at the beginning of the hearing on August 15, 1947 as appears in Reporter Craig's transcript which is a part of the Record certified to the Court of Appeals. Fol. 495.

At that hearing and on subsequent occasions at hearings he permitted counsel for interests adverse to the farmer debtor to outline the history of the case and proceeded to administer the case upon that understanding of its history —which amounted to disregarding the special provision of the farmer debtor statute Title 11 USC 203, i. e. "Sec. 75" and which are quite different and in many instances contrary to "Sec. 75".

This has been more amply stated in the petition herein at page 13 beginning: "The presiding judge, who came into the case", etc., in the paragraph numbered 1.

IV.

Specification of Error.

(Relating to the Affidavit of Bias and Prejudice.)

The Court of Appeals erred in sanctioning the failure of the District Judge to have nothing further to do with the case upon the filing of the Affidavit of Bias and Prejudice and the failure to assign another judge to sit and hear the case as provided in Title 28 USC 144.

V.

Summary of the Argument.

(Relating to the Affidavit of Bias and Prejudice.)

The statute, Title 28 USC 144, is very clear and is intended to apply to such an instance as this. Treating a farmer debtor case as if it were general bankruptcy is in its end results caused by a personal bias and prejudice.

VI.

Argument of the Second Branch of the Petition.

(Relating to the Affidavit of Bias and Prejudice.)

The Statute, Title 28 USC 144, is straightforward and clear: "Whenever a party to any proceeding makes and

files a timely and sufficient affidavit that the judge . . . has a personal bias and prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned" . . .

Every requirement of the statute was complied with and no fault has been found in the affidavit. The objection is that the affidavit is based upon the "rulings in the case" (Last paragraph of the opinion of the Court of Appeals, 188 F 2d 973, at page 975, in the last sentence of the opinion). Naturally it is to be expected that if a judge have a bias and prejudice against a party, his "rulings in the case" will be adverse and in that sense the Affidavit of Bias and Prejudice will be based upon them, but in a real, (common sense) sense the Affidavit of Bias and Prejudice will be based upon the personal bias and prejudice.

We suggest that the real intent and purpose of the statute is correctly stated by circuit Judge Murrah for the whole court in *Mitchell* v. *United States,* 126 F. 2d 550, in the first column on page 552: "The purpose of this section is to secure for all litigants a fair and impartial trial before a tribunal completely divested of any personal bias or prejudice, either for or against any party to the proceedings, and it is the duty of all courts to scrupulously adhere to the admonition and to guard against any appearance of personal bias or prejudice which might generate in the minds of litigants a well-grounded belief that the presiding judge is for **any reason** personally biased or prejudiced against their cause."

Applying this characterization to the present issue the statute squarely applies. When a judge conceives a farmer debtor to be a "bankrupt" in the sense of general bankruptcy and does not recognize the inherent statutory

characteristics of Sec. 75 which are contrary to general bankruptcy, the effect upon the litigant and the decisions in the case create the precise situation the statute is designed to remedy.

We see the same attitude that is complained in the Affidavit of Bias and Prejudice against the District Judge continued in the Court of Appeals opinion "Per Curiam" in the very first sentence of the opinion: "This is an appeal in the bankruptcy proceedings of Frank Campbell Littleton" and throughout the opinion in the use of the word "bankrupt" repeatedly. *Littleton* v. *DeLashmutt*, 188 F 2d 973.

CONCLUSION TO THE ARGUMENT ON THE SECOND BRANCH OF THE APPEAL.

(The Affidavit of Bias and Prejudice)

Counsel for petitioner is convinced that the petitioner is absolutely sincere in his belief as stated in his affidavit. We suggest, as we believe, that a judge has no desire to sit in a hearing if any party believes that he will not have a clear field on which to present his cause, and we believe that the courts should zealously preserve that public confidence in our judicial system which Title 28 USC Sec 144 is designed to guarantee.

With this frank statement we leave the Second Branch of this petition with this Court.

CONCLUSION.

(As to the Entire Petition for Certiorari.)

The farmer debtor law has been maladministered in this case and the farmer debtor should have the benefits which are solemnly and mandatorily provided by the farmer debtor law and sustained by this Court in its many decisions which recognize and protect its purpose. Such benefits can only come to him by the reversal of the judgment of the Court of Appeals and the remand of the cause to the District Court for administration and adjudication by a different District Judge.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio,
Counsel for the Petitioner.

Fairbanks, Alaska.
July 27, 1951

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 304

FRANK CAMPBELL LITTLETON, FARMER-DEBTOR, *Petitioner,*

v.

THOMAS N. DELASHMUTT, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

On June 18, 1941, the debtor (Petitioner) filed his petition under the Frazier-Lemke Act in the United States District Court for the Eastern District of Virginia*. There-

* References to the various papers, orders and decrees not in the printed record but mentioned in this Statement of the Case will be found in the Docket Entries, U. S. District Court, beginning at page 4 of the printed record.

after an order was entered on December 19, 1941, declaring him to be a bankrupt within the meaning of the Frazier-Lemke Act.

On April 14, 1942, the Conciliation Commissioner set aside the debtor's property and directed him to pay an annual rental of $7,600.00. Although the debtor enjoyed all of the benefits of a stay from April 14, 1942, upon the debtor's own petition in which he alleged that the three year moratorium period to which he was entitled should run from January 19, 1944, the District Court on November 29, 1945, directed that the three year period run from January 19, 1944 to January 19, 1947, (R. 27).

On August 25, 1947, an order was entered appointing trustees to sell the real estate (Part of the order is found at R. 28, and the order in full is printed at R. 46).

On September 4, 1947, the debtor filed a motion to review, reconsider and rescind the order of sale. This motion was overruled by an order entered in the District Court on September 23, 1947. Thereupon, the debtor appealed to the Court of Appeals.

On June 7, 1948, the Court of Appeals affirmed the order of sale entered in the District Court (*Littleton* v. *Rust,* 166 Fed. 2d 1007, Case No. 5693). Certiorari was denied by this Court (*Littleton* v. *Rust,* 334 U. S. 833).

On June 22, 1948, the debtor filed his petition in the District Court asking that the trustees be directed to postpone the sale of the real estate and other properties. On July 1, 1948, the District Court directed the trustees to proceed to execute the order of sale entered on August 25, 1947.

The sale was finally held on September 2, 1948, pursuant to the order of August 25, 1947. At the sale the Respondent was the highest bidder and the property was knocked down to him for $220,000.00. This was considerably in excess of the appraised value. The debtor did not exercise his right to redeem the property within ninety days after the date of the sale and, in fact, filed in the District Court

on December 8, 1948, in proper person and by counsel, a stipulation dated November 26, 1948, withdrawing all objections to matters relating in any way to the sale and requested that the property be conveyed to the Respondent (R. 51). On December 2, 1948, the trustees pursuant to the decree of the Court, conveyed the property to the Respondent. The acts of the trustees were approved and they were discharged by order entered on December 16, 1948.

Thereafter, there were a number of hearings in connection with the distribution of the proceeds of sale in which hearings the debtor actively participated without questioning the validity of the sale. These culminated in the second appeal (*Littleton* v. *Kincaid,* 179 F. 2d 848) to the Court of Appeals which issued its mandate on January 12, 1950, in connection with the distribution of the proceeds of sale. Certiorari was denied (*Littleton* v. *McNeil,* 340 U. S. 809).

In the meantime the respondent filed a motion requesting the District Court to require the debtor to remove his personal property from the real estate purchased by the respondent. After a hearing on April 27, 1949, the debtor consented to the entry of an order on May 9, 1949, in which it was adjudged that respondent was entitled to the full possession of the real estate and which directed and authorized the removal of debtor's personal property therefrom (R. 52).

From May 9, 1949, until March 14, 1950, no question was raised involving the rights of the respondent as purchaser of the real estate and, in fact, no question was raised as to the respondent's title to the real estate from December 2, 1948, the date of the Trustees' deed to respondent, until March 14, 1950.

On March 14, 1950, after all the foregoing, the debtor filed an application in the District Court to have the sale of the real estate to the respondent vacated (R. 29). The respondent filed in the District Court a motion to dismiss the application (R. 31) and on April 18, 1950, the debtor

filed an answer to the motion of the respondent (R. 33). The District Court advised the parties that it considered that all of the matters raised by the application had been passed upon and that there was no need for a hearing. However, the debtor was given an opportunity to file and filed on October 14, 1950, a brief in support of his application and also filed on October 16, 1950, numerous affidavits and exhibits relating to the application. On October 25, 1950, the Judge of the District Court advised counsel that having considered the application, brief and the actions of the courts, he did not deem any further hearing necessary and on November 8, 1950, entered an order denying the application (R. 39). In the meantime the debtor had filed on October 27, 1950, an affidavit of bias and prejudice based upon the Court's actions in this proceeding and requested that the Judge of the District Court disqualify himself (R. 36). The order of November 8, 1950, also denied the request that the Judge of the District Court so disqualify himself (R. 39).

On November 21, 1950, the debtor filed a motion for an order directing immediate disbursement of funds arising from the sale to respondent and such an order was entered on November 27, 1950 (R. 42).

On November 16, 1950, the debtor filed a motion for a hearing upon the application (R. 40) and this motion was denied by an order entered December 4, 1950 (R. 44).

The action of the District Court was affirmed by the Court of Appeals (*Littleton* v. *DeLashmutt,* 188 F. 2d 973).

This statement of the case has been more detailed than would be desirable except that it is felt to be proper in the statement to show that the debtor has been given every opportunity to protect his interests in every stage in the proceeding.

SUMMARY OF ARGUMENT.

The District Court and the Court of Appeals properly held that the application sought a re-examination or rehearing on questions already determined in the case; that the record disclosed the application was inconsistent with the debtor's conduct in the case, was frivolous and without merit; that the application was not seasonable and sought to disturb rights vested in reliance on former orders; that the District Court properly exercised its discretion in refusing to entertain the application; and that the affidavit of bias and prejudice was based upon adverse rulings in the cause and was properly held insufficient.

ARGUMENT.

The Petitioner asserts that none of the reasons given by the District Court for dismissing the application is tenable. He states such reasons to be (1) that the application related to issues theretofore determined by that Court and by the United States Court of Appeals; (2) that certiorari had been denied by the Supreme Court; (3) that the application was without merit and (4) that there was nothing before that Court in connection with the proceeding, the proceeding having been finally terminated. (This last does not appear in the court order but in a prior letter to counsel.) Although the Petitioner presents and attacks the four stated reasons separately they should be considered as a whole.

The Application Sought a Rehearing on Questions Already Determined in the Case.

An examination of the nine grounds stated in the application and of the record shows quite clearly that the District Court's reasons were justified and the Court acted properly in dismissing the application. For the same reasons the United States Court of Appeals properly affirmed the District Court. The nine grounds listed in the application

and the justification of the action by the District Court follows:

GROUND 1. *"No Stay order pursuant to the mandate of the Statute has ever been entered."* The statute (11 U. S. C. A. § 203 (s) (2)) provides that "when the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years." By an order entered January 19, 1944, (R. 25) the Court directed the stay period to commence on April 14, 1942—the date of the order by the Conciliation Commission. However, the question of the duration of the stay period was directly raised on petition of the debtor filed April 12, 1945 alleging that such period should not commence until the Court's order of January 19, 1944. The Court allowed the stay period exactly as requested by the debtor, namely, to January 19, 1947. (Order of November 29, 1945, R. 27). This effectively and completely foreclosed the petitioner from thereafter questiong the sufficiency of the stay order. This precise point was decided in *Pfister* v. *Northern Illinois Finance Corporation,* 317 U. S. 144 (1942) where the debtor appellant claimed error (p. 146) "because the order of stay approved by the Commissioner under § 75, sub. s(2) [on August 13, 1940], was far less than the statutory period of three years from the entry of the stay order." In affirming, this Court, by Mr. Justice Reed, said: (154)

> "IV. On account of debtor's motion, requesting the running of the moratorium of three years from April 26, 1940, the day of his adjudication in bankruptcy under 75, sub. s, we do not consider the correctness of a stay of less than three years under the other circumstances. In this instance it was correct.
> "Affirmed."

The Petitioner relies upon *Wright* v. *Logan,* 315 U. S. 139, in support of his claim that the proceedings in the

District Court were improper because no legal stay order was granted. In that case no stay order was entered at all. In our case a stay order was entered and the period fixed was that which was requested by the Petitioner. When the decree of sale entered August 25, 1947 (R. 46) was affirmed by the Court of Appeals, it was said (*Littleton* v. *Rust*, 166 F. 2d 1007, at 1008):

> "It appears, furthermore, that bankrupt has had the full three year period for rehabilitation that the statute contemplates and that the order of which he complains directing a sale of his property is an order of the District Judge made after full consideration of the rights of bankrupt and his creditors, and not affected in any way by any action of the Commissioner."

The same statement was reiterated in the opinion of the Court of Appeals in this case. *Littleton* v. *DeLashmutt*, 188 F. 2d 973, 974.

GROUND 2. *"The so-called Trustees, who purported to sell the real estate, were not qualified to act as such and all their actions in purporting to sell said real estate were void."* The trustees were specifically named in the decree of sale of August 25, 1947. At the time the debtor specifically objected to the appointment of trustees and stated such objections in points 11 and 13 in his "Statement of Points to be presented on Appeal." Having appealed once from the decree which directed the trustees to sell the real estate the debtor was not entitled to a rehearing by the District Court on that order. To avoid repetition, grounds 3, 4, 5, 6, 8 & 9 are subject to the same response.

GROUND 3. *"The purported sale of said real estate was not conducted as required by statute and was void."* There is no allegation that the sale did not conform to the decree of August 25, 1947, and no such allegation could be made with propriety. Whether the decree of sale was in strict conformity with the statute or not, it became the law of the case when affirmed.

GROUND 4. *"The purported advertisement of the purported sale of said real estate did not comply with the statutory requirements and was a nullity."* The decree of sale was explicit as to the manner of advertising (paragraph (c) thereof) and there is no allegation that it was not complied with.

GROUND 5. *"The person, namely, John F. Kincaid, who purported to act as Conciliation Commissioner, was not qualified to act as such officer and was not at any time during the proceeding affecting said real estate a Conciliation Commissioner, and his acts relating thereto were void."*. This was the principal point urged in the appeal from the decree of sale and the Court of Appeals squarely ruled adversely to the debtor, *Littleton* v. *Rust,* 166 F. 2d 1007 (1948).

GROUND 6. *"The said Farmer-Debtor, Frank Campbell Littleton, has never had the opportunity to pay off his debts so as to release all liens upon his real estate."* On that point the Court of Appeals said in 1948 (*Littleton* v. *Rust,* 166 F. 2d 1007, 1008):

> "The bankrupt has had every advantage under the law that the statute contemplates and more and has delayed his creditors for more than six years in the enforcement of their rights. The questions raised by his appeal have no merit. The order appealed from will be affirmed."

Even after that decision, the debtor had several months more—until ninety days after the sale, which was held September 2, 1948—to redeem the property.

GROUND 7. *"No auctioneer for the sale of said real estate was ever appointed or confirmed by the Court, and all the acts of the so-called auctioneer, who purported to cry the sale of the said real estate, were void."* Whether the auctioneer was appointed or not, the Court confirmed his acts by directing payment of his fee of $100.00 as recommended in the Trustees' Report of December 16, 1948. The scheme of distribution of all funds from the sale of

"Oak Hill" is final by mandate of the Court of Appeals (Case No. 5962) on which this Court refused certiorari. (*Littleton* v. *McNeil*, 340 U. S. 809)

GROUND 8. *"The requirements imposed upon potential bidders at said purported sale of said real estate were unlawful and impossible of compliance by such individuals as might desire the opportunity to purchase said real estate."* These were specifically prescribed in the decree of sale of August 25, 1947, and were complied with. (R. 47, paragraph c).

GROUND 9. *"In the Order of the Court entered August 25, 1947, for the sale of Oak Hill, the property so advertised was misdescribed, and stated that 1725.1 acres, by survey, were to be sold and said description was taken from a deed of trust dated August 29, 1939, describing property conveyed to David N. Rust, Jr., and W. A. Metzger, trustees, and duly recorded in the Clerk's Office of Loudoun County, Virginia, but there is no survey of record of the said property and so far as the petitioner is advised there never has been a survey of 1725.1 acres; that the description mentioned herein is not a true description of the property; that it is presently impossible to determine exactly what property was sold and conveyed by the so-called Trustees."* This ground, on its face, shows that the description was incorporated in the decree of August 25, 1947, which became the law of the case. In any event the same objection was raised by the debtor's petitions which were subsequently withdrawn by debtor's stipulation of November 26, 1948. (R. 51)

Not one single fact was alleged in the application which was not known to the debtor at the time of the prior adjudications of the District Court and of the Court of Appeals. There was nothing new presented to the District Court and certainly it was within the discretion of the court to deny a rehearing.

The Petitioner complains that the District Court, in denying the application, mentioned the fact that this Court

denied certiorari in the prior appeals and quoted from *State* v. *Baltimore Radio Show,* 338 U. S. 912 at 919 and *Augoston* v. *Commonwealth,* 71 Sup. Ct. 9, to the effect that a denial of certiorari does not indicate an approval of the decision in the court below. The language as used by the District Court carried no such implication but merely indicated the ultimate disposition of the appeals.

The Record Disclosed That the Application was Inconsistent with the Petitioner's Conduct, was Frivolous, and Without Merit.

The actions of the Petitioner from the date of the trustees' deed until the filing of the application, approximately fifteen months later, were entirely inconsistent with the Petitioner's repudiation of the sale as asserted in his application. This inconsistency cannot be excused by a vague reference to any contractual relation between the Petitioner and the Respondent. The Petitioner has nowhere alleged any facts supporting his general assertion that the Respondent was guilty of a breach of contract. Even if such facts had been alleged, the Court of Bankruptcy would have had no jurisdiction over a dispute arising out of the breach of contract. Any contract entered into between the Petitioner and the Respondent was outside of the farmer-debtor proceedings and an action for an alleged breach would necessarily be an independent action. No action of the District Court in this cause was based on such contract.

These inconsistent actions of Petitioner (debtor) were:

(a) On November 26, 1948, the debtor executed, acknowledged and delivered a deed quit-claiming and releasing all his right, title and interest in the "Oak Hill" farm to Thomas N. DeLashmutt (R. 32).

(b) On December 8, 1948, not 1949, as erroneously set forth in the Motion of Thomas N. DeLashmutt to Dismiss, (R. 31), the debtor, in his proper person over his own signature, endorsed by his then counsel, filed a document

herein, dated November 26, 1948 (R. 51) by which he specifically withdrew all motions, petitions and other objections theretofore filed objecting to a sale of Oak Hill and consented to the confirmation of the sale of said property to the Respondent pursuant to the decree of August 25, 1947.

(c) On April 2, 1949, DeLashmutt served notice upon the debtor and conciliation commissioner that he would ask the court to require all the furniture and other personal property to be removed from Oak Hill. As a result, a consent order was agreed upon between counsel for Littleton and DeLashmutt and was entered by the Court on May 9, 1949. (R. 52) This order recited that "said Thomas N. DeLashmutt is now entitled to free possession of the real estate purchased in these proceedings" and directed Littleton to remove his personal property from "Oak Hill" within specified periods. This order provided further that "Nothing contained herein shall be construed to prevent said Thomas N. DeLashmutt from the free use and enjoyment of said property known as 'Oak Hill'." The debtor's second appeal to the Court of Appeals was noted and perfected after the entry of this order, but no question as to the order was raised in either the Notice of Appeal or in the Statement of Points to be relied upon.

(d) The debtor accepted the benefits of the sale and was estopped to question its validity. On his numerous motions the entire proceeds except a balance of approximately $18,000.00 was paid out for his benefit. One month after the money was paid into court, the debtor, on January 7, 1949, filed a petition for a reference in order to make a prompt distribution of the funds, reciting the sale of the real property and the confirmation of the sale. On February 15, 1949, he moved that the first trust notes aggregating $136,788.14 be paid. On April 27, 1949, he filed a motion to withdraw $7,500.00 for his own use, alleging there would be approximately $20,000.00 surplus due him. On July 12, 1950 (after his application to vacate had been filed), he consented to an order directing immediate payment of $18,-

600.00 of the fund to the holder of the second trust. On November 21, 1950, he moved for the immediate disbursement of the entire balance of the funds. On December 21, 1950, an order was entered directing the conciliation commissioner to deliver to the creditors the checks against the fund which had theretofore been issued by the Clerk. The check to the debtor for the balance of the proceeds was held up pending some dispute over the amount of interest due certain creditors and on February 10, 1951, he filed an original mandamus proceeding in the Court of Appeals to compel the District Judge to order the balance paid to him (*Littleton* v. *Hutcheson,* Case No. 6240).

(e) The debtor, for a period of ten months from May 9, 1949, when he consented to the order directing removal of his personal property from "Oak Hill", until he filed his application on March 14, 1950, stood by in continued acquiescence and permitted DeLashmutt to go into possession. In the circumstances the debtor was guilty of laches.

From the record the sale was obviously fair. The debtor had placed a value of $165,050.00 on all his real estate when he filed his petition (R. 19). The court-appointed appraisers in their report of February 20, 1942, placed a valuation of $191,411 on all the land and buildings (R. 23). At the public sale, after the extensive advertising provided for in the decree of sale, DeLashmutt was the highest bidder at $220,000.00. While the application makes no mention of it, the appellant's brief in general terms states that any money paid "in" (presumably into Court) must be refunded to the purchaser. The debtor failed for more than six years during which he had the right to do so to pay into court the appraised value of the real estate and failed to exercise his right of redemption within the 90 day period allowed him after the sale. There is no assurance that he could or would do it if the sale were set aside.

The District Court was not Required to Entertain the Application.

We do not question the assertion of Petitioner that there are no terms in courts of bankruptcy. However, we do say that all of the cases upon the power of a District Court to re-examine orders entered in bankruptcy proceedings make as conditions of such re-examination that it be seasonable and that rights which will be disturbed by such re-examination have not become vested under the order. Furthermore, the granting of such re-examination is within the Court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion if entertained, is not the subject of appeal.

Pfister v. *Northern Illinois Finance Co.*, 317 U. S. 144.
Wragg v. *Federal Land Bank*, 317 U. S. 325.
Kimm v. *Cox*, 8 Cir., 130 F. 2d 721.
Curtis v. *O'Leary*, 8 Cir., 131 F. 2d 240.
Walgreen Drug Stores v. *Scruggs Drug Store*, 4 Cir., 129 F. 2d 789.
Standard Steel Works, 9 Cir., 111 F. 2d 1000.
Harris v. *Mills Novelty Co.*, 10 Cir., 106 F. 2d 976.
McLeod v. *Boone*, 9 Cir., 91 F. 2d 71.
Collier, Bankruptcy, 14 ed. § 2.12 (2).

The Petitioner cannot contend that the application was seasonable or that rights had not become vested when more than a year elapsed between the approval of the trustees' conveyance to the Respondent and the filing of the application, during which period the Petitioner consented to the order requiring the removal of his personal property from Oak Hill and participated in proceedings for the distribution of the purchase price paid by the Respondent into the Bankruptcy Court in reliance upon the validity of the decree of sale, approved by the Court of Appeals. Most of this money has been paid out in discharge of the Petitioner's obligations, on his own motions.

Both the District Court and the Court of Appeals characterized the application as seeking "a rehearing or fur-

ther hearing on issues raised in this proceeding" (R. 39, 61.).

There is no absolute "right to a hearing" on an application for a re-examination or rehearing, as contended by the petition, merely because a litigant asks for one, or files a paper in the cause. As said in *Walgreen Drug Stores* v. *Scruggs Drug Store, supra,* at page 790:

> "Undoubtedly the District Court 'has the power, for good reason, to revise its judgments upon reasonable application, and before rights have vested on the faith of its action.' Wayne Gas Company v. Owens-Illinois Company, 300 U. S. 131. However a litigant has no absolute right to a rehearing simply because he asks for one, for as was said in Wayne Gas Company v. Owens-Illinois Company, supra, 300 U. S. at 137: 'The granting of a rehearing is within the Court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal.'"

The necessity for such discretion in the District Court is made evident by the Petitioner's conduct in this case. From the date the decree of sale was affirmed on June 7, 1948, until the sale on September 2, 1948 the Petitioner filed eight separate petitions or motions directed toward arresting the sale. Had the Court been required to have taken testimony or even heard argument of counsel each time a new paper was filed, he could have forestalled the sale indefinitely by appeal from the order on each motion or petition. To require such a hearing on the application as demanded by the Petitioner, regardless of prior action of the Court, would result in endless vexation and harassment to litigants, as well as to the Courts. Public policy and the interest of litigants alike require that there be an end to litigation. See *Baldwin* v. *Iowa State Travelling Men's Asso.,* 283 U. S. 522. And in the absence of prohibitive legislation, Courts have inherent power to provide themselves with appropriate procedures required for the performance of their tasks. See *Ex parte Peterson,* 253 U. S.

300, 312. The District Court properly took judicial notice of the proceedings which had already been had in this case, and perceiving the debtor's application to be entirely devoid of merit, entered the order which of necessity would have been entered if a hearing or argument were had, without putting the litigants to the expense and inconvenience of such hearing or argument.

The District Court Properly Held the Affidavit of Bias or Prejudice to be Insufficient.

This point is passed over very quickly in the Petitioner's brief. A mere reading of the affidavit of bias or prejudice (R. 36) discloses not one single allegation of fact that the Judge was biased or prejudiced. The most that can be said is that it alleges that in some particulars the Judge made adverse rulings. The affidavit was not filed until after the Court had indicated its adverse ruling on the application. Such an affidavit is not sufficient to bring into operation 28 U. S. C. A., Section 144. *Ex Parte American Steel Barrel Co.,* 230 U. S. 35, 43; *Berger* v. *United States,* 255 U. S. 22, 31; *Morse* v. *Lewis,* 4 Cir. 54 F. 2d 1027; *Beecher* v. *Federal Land Bank,* 9 Cir. 153 F. 2d 987; *Walker* v. *United States,* 9 Cir. 116 F. 2d 458; *Ryan* v. *United States,* 8 Cir. 99 F. 2d 864; *Craven* v. *United States,* 1 Cir. 22 F. 2d 605.

If the affidavit of bias and prejudice were held to be sufficient, any litigant, upon learning of an adverse ruling, could have the matter in controversy referred to another judge and reopened.

CONCLUSION.

The Debtor had been afforded far more than his "day in court" prior to the filing of the application but, notwithstanding this, the District Court granted the Debtor an opportunity to present his argument in the form of a written brief. The Debtor did not show any merit in his application either before the District Court or in the presen-

tation in the United States Court of Appeals. Clearly the District Court acted properly in denying the application and there was no error in the opinion of the Court of Appeals.

It should be remembered that the only connection of the Respondent with this proceeding is as a bona fide purchaser at a judicial sale, and that his funds were paid into court and disbursed by it for the benefit of the Petitioner and his creditors.

We respectfully submit that the petition for a writ of certiorari should be denied.

James H. Simmonds,
Arlington, Virginia.

Fielding L. Williams,
Richmond, Virginia,
Counsel for Respondent.

October 15, 1951.

FILED
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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 304

JOSEPH J. MATHY, Executor of the Estate of FRANK CAMPBELL LITTLETON,
Farmer-Debtor,
Now Deceased,
Petitioner,

vs.

THOMAS N. DeLASHMUTT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

REPLY BRIEF ON BEHALF OF PETITIONER.
On the Subject of a Right to a Hearing.

ELMER McCLAIN,
Lima, Ohio
Counsel for Petitioner.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA KEVIEW 5-6581

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The brief of respondent sets up premises which are non-existent and thereupon offhand he cavalierly argues that the petitioner has no case.

If the premises assumed by respondent existed, he would be correct in his conclusions. They do not exist and his conclusions are outside the case.

These statements this reply brief will here demonstrate.

THE ONLY ISSUE RAISED ON APPEAL BELOW AND IN THIS COURT IS THE RIGHT TO A HEARING.

The respondent's brief sidesteps the real, and only, issue, namely, the *right to a hearing* of the questions raised in the pleadings. The questions raised in the pleadings were never heard.

These pleadings were: (1) the Application, (2) the Motion (or Answer) and (3) the Answer (or Reply). These pleadings are found in the Record as follows:

1. The Application, Court of Appeals Record 26a, repaged Record in this Court, R. 29.

2. The Motion (or Answer) of DeLashmutt, Court of Appeals Record 28a, repaged Record in this Court, R. 31.

3. The Answer (or Reply) of the Petitioner, Court of Appeals Record 30a, repaged Record in this Court, R. 33.

Those three pleadings presented two questions to be heard by the District Court *which had never theretofore been presented.* That court refused a hearing of those questions.

The only issue (1) heard in the District Court, (2) raised on appeal in the Court of Appeals, and (3) presented in this Court, is this one:

Should the District Court have heard those questions? That is, was the petitioner *deprived of a hearing?* The District Court never came to grips with the new questions so raised. It never granted a hearing.

The questions which the District Court refused to hear, and which had never theretofore been raised were these:

1. The first question raised in the District Court was this: No stay order was ever issued by the District Court as laid down by the mandate of the statute in U S C, Title 11, Section 203 (s) (2) (Section 75 (s) (2) of the Bankruptcy Act) which requires that "WHEN the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years."

This the Application and the Answer (Reply) of the petitioner alleged the District Court *did not do.* As stated by the respondent himself in his brief at page 2, "the District Court on *November 29, 1945*, directed that the three year period run from *January 19, 1944.*" This fatal defect in that order was alleged in Mr. Littleton's Application (R. 26a in Court of Appeals, R. 29 in this Court) at Paragraph I, (26a) R. 29, and in his Answer (Reply), (30a) R. 33 at Paragraph I, (31a) R. 34.

This being a *retroactive order* which the Court had no power to make, it was void.

Such was the first question raised in the District Court, but never given a hearing.

2. The second question raised, but never heard, in the District Court by the Motion (Answer) of the respondent DeLashmutt and by the Answer (Reply) of the petitioner Littleton was raised in this fashion:

DeLashmutt in his Motion (Answer), (R. 28a in Court of Appeals, R. 31 in this Court) at paragraphs (2) (b) and (c), alleged that (1) Mr. Littleton withdrew all objections theretofore filed by him and (2) by deed conveyed the real estate to Mr. DeLashmutt.

Mr. Littleton, in his Answer (Reply), (R. 30a in Court of Appeals, R. 33 in this Court) asserted that such withdrawal of objections and the deed were void because they were made and executed as part of a contract between him and respondent whereby in consideration of them the respondent agreed to do certain things which he never performed, but wholly disregarded his obligations thereunder.

THOSE TWO QUESTIONS, WHICH WERE NEW AND NEVER BEFORE RAISED, NEVER REACHED A HEARING IN THE DISTRICT COURT BECAUSE THAT COURT REFUSED TO HEAR THEM.

THE ONLY ISSUE THAT WAS APPEALED FROM THE DISTRICT COURT WAS CREATED BY THE REFUSAL OF THAT COURT TO AFFORD A HEARING OF THE QUESTIONS PRESENTED TO IT. THE COURT OF APPEALS REFUSED TO CONSIDER THAT ISSUE OF THE RIGHT TO BE HEARD.

Instead of meeting that issue of a *right to a hearing* the respondent contended in the Court of Appeals and he now continues to contend here, that the two questions presented had already been heard and considered in the District Court and in the Court of Appeals, and in this Court.

That contention is entirely false, as is shown at pages 23, 24 and 25 of the petitioner's brief in this Court.

In short the respondent refuses to meet the issue and parries it by raising points not in the appeal or in this proceeding seeking certiorari.

HOW RESPONDENT PARRIES THE POINT.

In respondent's brief in this Court at page 4, fifth line from the top of the page, he says: "However, the debtor was given an opportunity to file and filed on October 14, 1950, a brief in support of his application" . . . That statement is wholly false. A reading of the brief he refers to refutes his statement and shows that it argued only the right to a hearing.

That brief of October 14, 1950, is at R. 43a in the Court of Appeals, and in this Court at R. 76. In two short paragraphs at the bottom of R. 76 appear these words:

> "It" [that is, the brief] "*includes* the right of the farmer-debtor to file his application and *have it heard* and the jurisdiction of the court to hear and rule upon it.
>
> "It does not purport to present or argue the substantiative matters which are comprised in the application but *is confined solely to* the adjective subject of procedure—*the right of presentation, the right to be heard,*" . . .

The last paragraph of that brief (at Court of Appeals R. 51a, in this Court R. 84) reads:

> "The pending Application filed March 14, 1950, is properly before the Court for presentation at a hearing."

The petitioner then filed a Motion for Hearing of his Application Court of Appeals 37a, in this Court R. 40. That Motion for Hearing was denied. Court of Appeals 41a, in this Court R. 44.

Therefore it is incontestibly proved that these two questions were never given a hearing in the District Court. Instead the Application which raised them was called an application for a "*rehearing*" which it was *not*.

The Court of Appeals also called it an application for a "*rehearing*" and the respondent continues likewise to parry the issue in this Court.

We repeat that the only issue which the District Court heard was *the right to have the questions* raised by the Application, the Motion and the Answer *heard* and the court denied that right.

That issue the District Court parried by calling the Application an Application for a "*rehearing;*" the Court of Appeals called it "*rehearing;*" the respondent argues now in this Court by calling it "rehearing."

RESPONDENT'S ARGUMENT THAT A COURT HAS DISCRETION TO DENY A HEARING OR TO GRANT ONE HAS NO PLACE IN THIS CASE.

We agree fully with the argument of the respondent that the power to *rehear*, or *reexamine*, an *issue already heard* is to be exercised in the discretion of the Court.

That subject is but a scape goat on to which is loaded the specious argument which has already resulted in the violation of one of the most important conceptions of Anglo-American Jurisprudence—a litigant is entitled to his day in court when he can present his case and have it decided upon the evidence he adduces to sustain his allegations.

It is a novel suggestion that (1) what has never before been alleged or decided at any hearing has already been heard, and a *hearing* of it would be a *rehearing*, and (2)

though evidence to sustain the allegations has not been presented at a hearing, nevertheless they are not sustained.

Public confidence in the judiciary and in our judicial system is destroyed by such procedure.

RESPONDENT'S ARGUMENT OF "BREACH OF CONTRACT".

Another specious scape goat argument of the respondent is that although the respondent had taken from petitioner certain considerations under a contract which he has refused to honor, yet the petitioner may not rescind the contract for failure of consideration but must sue for damages. We do not understand that to be the law. Whether it is or not, is not before this court, was not before the Court of Appeals, and was never considered upon a hearing in the District Court.

We will repeat what was said in petitioner's brief in this Court, in the Court of Appeals and in the District Court, namely:

1. The money paid into the District Court under the purported sale should be returned to the respondent, who was the purchaser.

2. Claims that have been paid, are not involved, they remain paid.

The tragedy of this farmer-debtor case is that there were at all times ample assets to pay all claims and court costs and repeated attempts, over many years, to have them all paid were denied. This is further emphsized by the fact

that, as referred to in respondent's brief under paragraph (d) on page 11, the petitioner's $18,000 was never paid out to him by the Court. In fact, more than that sum still reposes in the registry of the District Court despite all efforts to dislodge it, after all claims and costs of every kind have been paid.

Perhaps among all the farmer-debtor cases administered under the farmer-debtor statute there have been more instances of deviation from it in this case than in any other such case. This resulted primarily because it was administered as a bankruptcy case to be controlled by the creditors, and not by the court, controlled by the mandate of the statute, as time after time directed by this Court.

Respectfully submitted,

ELMER MCCLAIN
Counsel for Joseph J. Mathy, Executor of the Estate of Frank Campbell Littleton, deceased.

Lima, Ohio
November 23, 1951.